

# Liability Regime Concerning The Oil Pollution Rising From Offshore Facilities



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## 1 Introduction

Oil and gas from deepwater fields is becoming an increasingly important to supply the world’s energy need. Offshore has provided nearly 70% of the major oil and gas discoveries worldwide in the last decade and Deepwater oil and gas discoveries have averaged 5.5 billion bbl. of oil equivalent/year over the last 5 years with an average discovery size of

150 million bbl vs. 25 million bbl for onshore.<sup>1</sup> With more activities in less favorable deepwater areas, offshore oil and gas exploitation and exploration have also been a main source of marine oil pollution. The risk of offshore oil production causing oil spills is becoming increasingly high which has been demonstrated by the latest incidents incurred .According to the Maritime Accident Casebook, there have been, not counting Deepwater Horizon, 44 notable blowout events world-wide since 1955. <sup>2</sup>The mean interval between the blowouts was about 15 months.<sup>3</sup>

The recent catastrophic oil pollution arising from the explosion of the Deepwater Horizon oilwell in the Gulf of Mexico on 20 April 2010, and a series of oil spills that began on June 4, 2011 at Bohai Bay of China have received high publicity .

### *The Purposes of this thesis*

The series of oil spills at Bohai Bay of China 2011 has revealed the weakness of China's legal framework on the oil spill arising from offshore installment .Though by 2013 September China has surpassed United State to become largest oil importer and China's offshore petroleum industry has been developed rapidly during last decade, there are still many gaps in legislations on offshore oil spill . China's legal

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<sup>1</sup> .Rafael Sandrea , Deepwater crude oil output: How large will the uptick be? Available at <http://www.ogj.com/articles/print/volume-108/issue-41/exploration-development/deepwater-crude-oil-output-how-large.html>

<sup>2</sup> See Delving Into Deepwater—Before The Blow-Out, MARITIME ACCIDENT CASEBOOK (July 9, 2013), <http://maritimeaccident.org/2010/07/delving-into-deepwater-before-the-blow-out>

<sup>3</sup> Ibid

framework is not well prepared for large oil spill incident such as Bohai Bay spill 2011 . The need to examine the current legal framework regulating oil spill from offshore installment has become an urgent problem for China. The Bohai Oil Spill accident has provided a classical case study for improving marine environmental prevention mechanism and building a comprehensive liability and compensation regime.

This thesis is inspired by the legal problems represents in the recent devastating incidents .The scope of this thesis however, is confined to oil pollution arising from the offshore oil exploration and exploitation activities Oil spills have occurred virtually everywhere around the globe, and they pose challenges to the environmental, administrative, regulatory, maritime, and tort laws of legal systems.<sup>4</sup> In this thesis, I choose to narrow down the focus to only one of those challenges presented: Liability regime on oil pollution arising from the offshore facilities. Specific questions such as whether the current legal framework on international level for liability concerning offshore oil pollution is robust and comprehensive enough and whether the compensation provided by the existing liability regime is adequate and efficient to

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<sup>4</sup> Vernon Valentine Palmer ,The Great Spill in the Gulf ... and a Sea of Pure Economic Loss: Reflections on the Boundaries of Civil Liability, 116 PENN ST. L. REV. 105 (2011)

cover the damages rising from such incidents are being seriously are going to be examined.

Understanding the current legal framework concerning the oil spill arising from offshore installments on international level is a necessary step to evaluate the problems, which provide the basis to examine the domestic law . Also, analyzing how liability for damages is regulated and whether adequate compensation has been achieved under different jurisdictions is equally important .By comparison, it is easy to exam the weakness in the current liability regime of China. By drawing the strengths of other regimes, more robust and efficient liability regime can be achieved in China .

*The plan of this thesis is as follows:*

- 1 )To provide a brief analysis on existing international conventions regulating oil spill arising from offshore facilities with particular emphasis on the part concerning liability and compensation for oil pollution .
- 2) To analyze how the liability and compensation mechanisms work in three given jurisdictions -THE UK Norway , US when the oil pollution materializes .

3)To use the outcome of two items above as a basis to examine the current domestic law in China on the liability concerning offshore oil pollution , especially in light of the 2011 Bohai Bay oil spill .

4 )The need, if any, to improve existing liability regime in China and make suggestions on the perfection of legal framework on oil spill pollution arising from offshore installment .

## **2 Fragmented and incomplete international framework on offshore oil exploitation**

Rochette noted current international legal framework on offshore oil operation is fragmented and uncompleted.<sup>5</sup>

There are two types of international law that are most fundamental in this field:

**The first type** is international convention. United Nations Convention on the Law of the Sea (UNCLOS)<sup>6</sup>, in line with the principle of state sovereignty over natural resources,<sup>7</sup> grants each nation the property rights to their natural resources including offshore oil and gas resource .To be specific , under Articles 74 and 77 of UNCLOS , nation

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<sup>5</sup> Rochette, J. (2012), "Towards an international regulation of offshore oil exploitation"- Report of the experts workshop held at the Paris Oceanographic Institute on 30 March 2012, Working Papers N°15/12, IDDRI, Paris, France, 18 p

<sup>6</sup> United Nations Convention on the Law of the Sea (UNCLOS), 1982, 1833 UNTS 3 (entered into force 16 November 1994).

<sup>7</sup> Schwebel, S.M. (1963) 'The story of the U.N.'s declaration on permanent sovereignty over natural resources', American Bar Association Journal, 49: 463



can assert its right to the EEZ and Continental Shelf. Besides, offshore oil platform located in the EEZ and OCS falls into each nation's jurisdiction<sup>8</sup> and regulation regime<sup>9</sup>. In addition, UNCLOS requires coastal state must enforce regulations to prevent, reduce and control pollution of the marine environment including the pollution arising from offshore installment.<sup>10</sup> It is worthy noting that no detailed or specific standards on the prevention of marine pollution are stipulated under UNCLOS, it leaves to States to develop national laws.<sup>11</sup> UNCLOS therefore provides the legal basis to create an international regime for offshore oil activities but no such a regime has been established so far.<sup>12</sup> The second category is the IMO conventions that stipulate member states' responsibility to establish legal mechanism on safety, prevention and respond to oil spills.

**The second category** is the IMO<sup>13</sup> conventions that stipulate member states' responsibility to establish legal mechanism on safety, prevention and respond to oil spills.<sup>14</sup>

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<sup>8</sup> Ibid arts 60, 80

<sup>9</sup> See UNCLOS, supra note 11, arts. 55–57; Scott J. Shackelford, The Tragedy of the Common Heritage of Mankind, 28 STAN. ENVTL. L.J. 109, 127 n.76 (2009).

<sup>10</sup> See UNCLOS, supra note 11, arts. 192–237

<sup>11</sup> Mikhail Kashubsky, 'Marine Pollution from the Offshore Oil and Gas Industry: Review of Major Conventions and Russian Law (Part I)' (2007) 152 Maritime Studies 1, 3

<sup>12</sup> Rochette, J n above 6.3 Ibid arts 60, 80

<sup>13</sup> International Maritime Organization <http://www.imo.org/About/Pages/Default.aspx>

By bearing in mind that IMO's mandate is limited to shipping-related issues. IMO responsibility in regulating offshore activities is to the extent that it involves ship and/or interfere with shipping safety .Though the competence of IMO to stipulate conventions regarding offshore operation is quite restricted, <sup>15</sup>the role of IMO is still very important as there are certain provisions in existed shipping conventions extending the application of these instruments to offshore oil platforms.

***1 )International Convention on Oil Pollution Preparedness, Response and Cooperation,1990 (OPRC 1990) <sup>16</sup>***

Apart from vessels , OPRC 1990 also applies to fixed or floating offshore installations ,<sup>17</sup> stipulating detailed provisions on dealing with pollution incidents and aiming at providing a global framework for international

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<sup>14</sup> Ibid

<sup>15</sup> IMO doc LEG 99/13/1 On the 99th session , The IMO legal committee expressly states : “UNCLOS does not contain any reference to IMO's role regarding offshore oil exploration and production (E&P) activities. According to UNCLOS, IMO's competence related to offshore oil platforms is limited to their impacts on maritime navigation. Annex VIII, article 2, is the only provision that mentions IMO in the Convention, indirectly acknowledging IMO's authority to deal with questions associated to navigation activities, but not with questions associated to marine environmental pollution derived from other causes. Article 60 of UNCLOS clearly acknowledges that maritime installations and structures are objects essentially different from vessels and are subject to a separate set of rules. Such understanding is reaffirmed in article 80 of UNCLOS, which regulates activities within the continental platform.” retrieved from [https://www.ccaimo.mar.mil.br/sites/default/files/LEG\\_99-13-1\\_0.pdf](https://www.ccaimo.mar.mil.br/sites/default/files/LEG_99-13-1_0.pdf)

<sup>16</sup> International Convention on Oil Pollution Preparedness, Response and Cooperation (Convention on Oil Pollution), 1990, 30 ILM 1991 (entered into force 13 May 1995).

<sup>17</sup> International Convention on Oil Pollution Preparedness, Response and Co-operation art.2(4), Nov. 30, 1990, S. Treaty Doc. No. 102-11, 1891 U.N.T.S. 51. Also regarding the relationship between UNCLOS and these conventions, see Craig H. Allen, Revisiting the Thames Formula: The Evolving Role of the International Maritime Organization and Its Member States in Implementing the 1982 Law of the Sea Convention, 10 SAN DIEGO INT’L L.J. 265, 271–87 (2009).

co-operation in combating major incidents or threats of marine pollution.<sup>18</sup> The OPRC is considered to be:

"Probably the most important international legal document that regulates pollution of the marine environment resulting from offshore oil and gas activities."<sup>19</sup>

2 )Regarding Safety , Chapter 7 of **MARPOL 73/78**, regulation 39, sets out special requirements for fixed or floating platforms. In addition , ***The code of Construction and Equipment of Mobile Offshore Drilling Units (2009 MODU Code)***<sup>20</sup> supersedes the 1989 MODU Code , provides an international standards on "design criteria, construction standards and other safety measures for mobile offshore drilling units (MODUs) so as to minimize the risks to such units, to the personnel onboard, and to the environment".<sup>21</sup>

There are also several IMO guidelines regulating personnels who work on oil platform such as "***Recommendations on Training of Personnel on Mobile Offshore Units***"<sup>22</sup> and "***Convention on Standards for Training,***

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<sup>18</sup> Brief introduction on OPRC from IMO website .[http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-Oil-Pollution-Preparedness,-Response-and-Co-operation-\(OPRC\).aspx](http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-Oil-Pollution-Preparedness,-Response-and-Co-operation-(OPRC).aspx)

<sup>19</sup> Mikhail Kashubsky, n above 151

<sup>20</sup> See Int'l Maritime Org. [IMO], Code for the Construction and Equipment of Mobile Offshore Drilling Units, at 2, IMO Assemb. Res. A.1023(26) (Jan. 18, 2010)

<sup>21</sup> 8 Ibid., Article 2

<sup>22</sup> A21/res. 891.

**Certification and Watch Standing (STCW)**<sup>23</sup> . Apart from regulating crews behaviour on board ship, The latter is equally applicable to offshore industry ,<sup>24</sup> however there are still many gaps to address the behaviour of drilling crews .

3 ) Regarding liability and compensation regime ,though there were quite a lot attempts had been made , so far there is no specific convention come into force .

The first attempt is “**Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources**” (CLEE)<sup>25</sup> which stipulated the scope of liability, the principle of strict liability and mandatory insurance. Although this was adopted by a conference in London in 1976, it has never come into effect due to no sufficient number of ratifications.

Following CLEE, there were also attempts on “**Rio Draft Convention on Offshore Mobile Craft**”<sup>26</sup> and a further revised “**Sydney Draft**”<sup>27</sup> . However because United States changed its initial supportive position

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<sup>23</sup> Adopted July 7, 1978, entered into force April 28, 1984

<sup>24</sup> This Convention was the first to establish basic requirements for training, certification and watch keeping for seafarers at an international level. The IMO website notes that previous standards for such activities were established by individual governments without referenced to practices in other countries "as a result standards and procedures varied widely, even though shipping is the most international of all industries".(Wylie Spicer ,2012)

<sup>25</sup> Adopted on 1 May 1977, London, United Kingdom

<sup>26</sup> Draft International Convention on Offshore Mobile Craft, IMO Doc LEG/34/6(b), 19 December 1977 (not in force).

<sup>27</sup> Draft Convention on Offshore Mobile Craft 1994, (not in force).

and challenged the need for a comprehensive international treaty on offshore units, IMO chose to remove the subject from their respective work programmes .<sup>28</sup>

The most recent attempt to fill the gap in Liability and compensation regime in oil pollution arising from offshore installment is the ***Indonesia's proposal*** in September 2010.

The explosion on the Montara wellhead platform which located in Australia economic exclusive zone (EEZ) happened on 21 August 2009, oil slicks and sheen spread across 5,800 square miles and had entered Indonesian waters of Timor Sea .Though identifying oil spill source is not an easy task to accomplish and it is more difficult to evaluate the oil blowout damage , Government of Indonesia is reported<sup>29</sup> to have claimed \$2.5 billion for damage to marine environment in Timor Sea and socio-economic loss of community on Rote Island off Indonesia (the closest village to the Montara oil rigs) .<sup>30</sup>

The rig and platform are owned and operated by PTTEP Australasia,<sup>31</sup> no proper insurance is bought by this company and so far no compensation has been made .The wider concern from Indonesia is that even if there were appropriate insurance arranged by the oil company, the insurance companies may have limitation of liability, the cap is

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<sup>28</sup> Kashubsky, above n 14, 5

<sup>29</sup> Presentation of Youna Lyons to the September 2011 Bali Conference

<sup>30</sup> MO DOC LEG 97/14/1 Refer to "The total catch of fishermen in Kupang, the closest Indonesian village to the affected area, has drastically decreased in the period following the Montara incident. A reduction in the production of seaweed in the affected coastal area during the period from September 2009 to January 2010 has also been observed

<sup>31</sup> It is a subsidiary of the Thai -owned PTT Exploration and Production Public Company Limited

usually decided by national regulation of respective country or dealt with in regional arrangements. The deficiency presented by this case is ,according to the Indonesian delegation, is a lack of internationally-agreed, uniform mechanism to address the consequences of all incidents of this nature . Indonesia therefore proposed the Legal Committee of IMO to establish a international legal regime to regulate the liability and compensation for oil pollution arising from drilling activities in connection with exploration and exploitation of oil and gas. Three sessions of the Legal Committee have been hold and extensive discussions have been concentrated on the two main issues -- procedural and substantive.

### **Procedure issue**

IMO Assembly (hold every two years) adopts the Strategic Plan for the Organization (covering a six-year period), and all new proposals are required to be in line with the current Strategic plan .

In LEG 97 , it recommended that the Organization's Strategic Direction 7.2 should be revised to read as follows:

*"IMO will focus on reducing and eliminating any adverse impact by shipping or by offshore oil exploration and exploitation activities on the environment by ... developing effective measures for mitigating and responding to the impact on the environment caused by shipping incidents and operational pollution from ships and liability and*

*compensation issues connected with trans boundary pollution damage resulting from offshore oil exploration and exploitation activities."*

However it is obviously not the case for Indonesia's proposal fits the strategic direction ,and the request to revise the direction to include offshore oil and gas activities in IMO's mandate was blocked by member states, including the THE UK, Norway, the US and Canada.

### **Substantive issue**

There are views both in and against Indonesia's proposal.

The opinions in favor of establishing a uniform international convention on pollution arising from offshore oil operation are as below:<sup>32</sup>

- (i) In light of Montara incident, it is time to establish a legal framework in case the next serious incident occurs;
- (ii) There is no better forum than IMO to deal with this issue given its characteristics, experience and expertise;
- (iii)it is notable that there is no boundary for oil pollution and the damage may spread across countries , without a international mechanism , it is very difficult for every country to deal with it on its own .

The arguments against the proposal are following:<sup>33</sup>

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<sup>32</sup> Rochette, J above n 8 p

<sup>33</sup> Ibid

(i)According to UNCLOS, IMO's competence related to offshore oil platforms is limited to their impacts on maritime navigation,<sup>34</sup>and regarding marine environment pollution, the Article 1 of IMO Convention expressly restricts IMO's competence to pollution caused by ships .

(ii)The proposal to request IMO duplicating the liability conventions applicable to oil pollutions caused by ships to offshore sector is not feasible , as damage of oil pollution caused by ships usually has an international impact and may potentially influence any country while unlike shipping has a global reach and impact , due to the location of oil rigs , the oil pollution from offshore facilities rarely involves several countries .Substantial differences exist between shipping and offshore sectors should be noted .

(iii) The issue discussed is governed by national legislations, pursuant to the provisions of the United Nations Convention on the Law of the Sea (UNCLOS)

(iv) Another fundamental thing is the lack of an international technical structure to define common safety standards. Legal committee stated “Only an international technical structure capable of establishing safety standards uniform to all platforms in the world and also capable of

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<sup>34</sup> Ibid



certifying and inspecting these structures would provide the necessary effectiveness to this system based upon the objective liability of the operators".<sup>35</sup>

(v) Bilateral or regional agreement is considered to be a better solution regarding the pollution rising from offshore facilities.

On 20th April 2012. The IMO refused to include offshore drilling on its work agenda and considered no compelling need to establish an international convention on this issue.

### **Regional Regulations**

Though it is the failure that Indonesia 's proposal to build a comprehensive liability convention regulating oil pollution from offshore facility , IMO still plays an important role to stimulate the emergence of bilateral or regional arrangements.

Because of the deficiencies in the international law , the regional regulations have played an important role in filling gaps on offshore oil operation regime .Examples include the 1992 Convention for the protection of the marine environment of the North-East Atlantic (the OSPAR Convention) ,Protocol for the protection of the Mediterranean sea against pollution resulting from exploration and exploitation of the continental shelf and the seabed and its subsoil ,the 1978 Regional

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<sup>35</sup> IMO DOC LEG 99/13/1 ,7p

Convention for Cooperation of the Protection of the Marine Environment from Pollution(1978 Kuwait Convention) and the1989 Kuwait Protocol , Convention for co-operation in the protection and development of the marine and coastal environment of the West and Central African Region . <sup>36</sup>

To sum up, there are several international conventions which have connections with offshore related risks, however the focus of most of these conventions such as UNCLOS and MARPOL 73/78 is on safety, and little concern has been given on liability and compensation regime. The absence of any international regime to cover oil spills rising from offshore oil operation activities is an obvious deficiency in international law. Though several attempts have been made to establish a uniformed liability convention. It ended up that oil pollution liability rising from offshore facilities is still largely governed by domestic law.

### 3 Liability Regimes

The origin of the international liability regime on marine oil pollution is the Torrey Canyon disaster of 1967.<sup>37</sup> Basis the lessons learned from

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<sup>36</sup> For more details on these regional conventions , refer to Zhiguo Gao (2000) environmental regulation of the oil and gas industries , Journal for the center for Energy , Petroleum and Mineral Law and Policy , Vol 2-11 Article ;M.Kashubsky n.above 1-11 ; Rochette, J n above 10-11

<sup>37</sup> Torrey Canyon was a Suezmax oil tanker loaded 120,000 tons of crude oil. She was shipwrecked off the western coast of Cornwall, England in March 1967, causing an environmental disaster. The Torrey Canyon oil spill is one of the world's most serious oil spills that about 50 miles (80 km) of French and 120 miles (190 km) of Cornish coast were contaminated and around 15,000 sea birds were killed, along with huge numbers of marine organisms, before the 270 square miles (700 km<sup>2</sup>) slick dispersed.

this disaster, it was the catalyst for work on liability and compensation on international level. The outcome was the creation of the 1969 and 197 conventions and the IOPC compensation regime.<sup>38</sup> So far, there have been several global international agreements on civil liability on oil spills from ships. And the primary conventions are the Civil Liability for Oil Pollution Damage 1992 (CLC 92) and the complementary International Convention on the Establishment of an International Fund for Oil Pollution Damage 1992 (Fund Convention). However the ship source oil pollution presents different issues to one presented by offshore operation activities. Neither of these two conventions applies to oil rigs which fall outside the scope of CLC 92 convention objects - ships carrying oil as cargo that are on a voyage.

Generally, there is a lack of comprehensive international mechanism to address the oil pollution damage arising from offshore installment. The main reasons for the absence of a binding uniform approach are two fold :The first reason is that compared with the oil pollution arising from vessels , there is quite low chance for the oilwell blowout incidents incurred , thanks to the cutting -edge offshore technology and the well -built prevention regulations .<sup>39</sup> Though there are few cases concerning

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<sup>38</sup> Micheal .G.Faure , Hui Wang , Civil Liability and Compensation for Marine Pollution - Lessons to Be Learned for Offshore Oil Spills , supra note 82, at 243

<sup>39</sup> Ibid

offshore oil spill damage , the possibility always exists since the risk involved can never be eliminated the alarm of which has been ringed by both Horizon deepwater disaster and Baohai 2011 oil spill . The second reason is the fact that the majority of offshore operations take place on the continental shelf which falls the scope of the national jurisdiction of the coastal States, therefore National laws are the redress method.

As mentioned above, it is the responsibility of the individual state to stipulate regulations regarding liability regime , therefore in this thesis three jurisdiction, namely the UK, Norway and the USA were chosen to illustrate how domestic law stipulates the liability and compensation. Since these three nations are the most characterized ones with strong offshore oil and gas exploration and exploitation interest , and comparatively mature liability regimes have been built up through experience and lessons accumulated during decade development of offshore industry . The three given countries are good examples of a regulatory and liability regime that protects the environment while ensuring economic growth.

Before comparing the differences and similarities among three countries , it is necessary to have an general view of liability regime in each nation .

### 3.1 THE UK Regime

#### Overview

The offshore oil and gas operation activities in the UK are concentrated in the North Sea. In light of rapid growth on offshore industry in the North Sea, the UK authority passed Petroleum Act 1998 - the main body of legislation on offshore drilling which establishes the regulatory regime on oil and gas exploration and production in THE UK. Under THE UK Petroleum law, all rights to "search for, bore for and get" petroleum are vested in the Crown.

A licensing regime was also built by The Petroleum Act 1998. In THE UK licensing system, before being granted the license, sufficient funds are requested to be provided by licensee in order to cover the liabilities for damage caused by any oil pollution. In addition, Licensees must keep the Secretary of State and the Department of Energy and Climate Change fully indemnified against all claims that may be brought by third parties in connection with the license.

Currently the role of stipulating offshore regulations of THE UK is spread over three authorities:

- 1) The Department of Energy and Climate Change (DECC) : This department is mainly responsibility for granting exploration license and enforcing environmental legislations .

2) The Health and Safety Executive (HSE) : HSE is the national independent watchdog for work-related health, safety and illness .

<sup>40</sup>The specific issues of offshore oil and gas industry is regulated by its Energy Division .Their mission “to protect people's health and safety by ensuring risks in the changing workplace are properly controlled”.<sup>41</sup>

3)Maritime and Coastguard Agency (MCA) : MCA is responsible to implement maritime safety policy and response to pollution from offshore installations.

### Liability Regime

Concerning an oil pollution incident within United Kingdom territory, the primarily legislations concerning the liability are as below :

- 1)the Offshore Pollution Liability Agreement 1974("OPOL")
- 2) the Environmental Damage (Prevention and Remediation) Regulations 2009
- 3) Tort law

### **OPOL**

OPOL was initially drafted as an interim measure during the negotiation of a regional Convention of Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources (CLEE). However since the nine participating States failed to reach an agreement, it was unratified in the end . But the THE UK

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<sup>40</sup> <http://www.hse.gov.uk/aboutus/>

<sup>41</sup> Ibid

Government remained their interests toward it and regarded the OPOL Agreement to be a efficient mechanism to establish the strict liability regime .Therefore OPOL became a primarily redress concerning the oil pollution arising from offshore facilities within THE UK territory.

In THE UK , the precondition to be granted a license of offshore operation is to become a member of Offshore Pollution Liability Agreement of 1975 (OPOL) .However it should be noted that OPOL is a voluntary oil pollution compensation scheme funded by THE UK offshore operators instead of a legislation . The cover provided is ‘direct loss or damage by contamination which results from a discharge of oil’ from offshore installments within the jurisdiction of member state .<sup>42</sup>

Though the nature of OPOL is a voluntary agreement , the relevant government department for offshore regulatory matters, DECC requires all operators to have signed up to OPOL and the sufficient evidence of financial responsibility . In this way , OPOL becomes a single-tier system funded by oil industry . If the third party liability under the OPOL scheme for some reason does not materialize, or there are

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<sup>42</sup> Apart from THE UK , there are other eight member states , namely Denmark, Germany, France, Netherlands, Norway, the Isle of Man and the Faroe Islands.

defaults on that payment, the entire industry has a collective responsibility to meet those payments.<sup>43</sup>

The key element of OPOL is imposing the strict liability (with certain exemptions) on operator solely . Any Person who sustains Pollution Damage (defined as “ direct loss or damage by contamination which results from a discharge of oil.”) can directly claim operator .In addition , public authority is also entitled to claim the operator concerning the remedial measures which is defined as “prevent, mitigate or eliminate pollution damage following such Discharge of Oil or to remove or neutralize the oil involved in such discharge.”

Though OPOL directs liability to operator, it remains silent on the allocation of risk between operator and contractor, leaving the issue of apportionment to the contract between two parties without prejudice to operator’s right of recourse.

The current liability cap is \$250 million (remedial measures up to \$125 million per incident and pollution damage up to \$125 million per incident) . If the damage exceeds \$250 million, OPOL does not prevent victims from seeking alternative redress through general tort law .This

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<sup>43</sup> THE UK parliament ,THE UK Deepwater Drilling - Implications of the Gulf of Mexico Oil Spill - Energy and Climate Change Contents - Liability and Compensation available at <http://www.publications.parliament.the.uk/pa/cm201011/cmselect/cmenergy/450/45007.htm#note125>(last visited 20.Sep.2013)



equally applies to the damage or loss beyond the scope of OPOL definition.

Another feature of OPOL is rapid payment - under this agreement there is no need for legal action .As long as the claimant provides the documents required concerning the claims which are recoverable under OPOL, the operator should make full payment subject to the agreement. OPOL facilitates prompt settlement by avoiding the lengthy and complicated legal process.

### **Environmental Damage (Prevention and Remediation) Regulations 2009**

These Regulations implement the EC Environmental Liability Directive in THE UK. It enforces strict liability for prevention and remediation of environmental damage to 'biodiversity', water and land from specified activities and remediation of environmental damage. However this regulation is only limit to Pay costs claimed by the authority in relation to "environmental damage" excluding the any third party claim .<sup>44</sup>

#### **Tort Law**

As mentioned above, tort law provides another layer of protection for the offshore oil pollution victims when their damage or loss can not be

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<sup>44</sup> See more on THE UK Environmental Liability website

[http://www.the-uk-oil-environmental-legislation.org/Contents/topic\\_files/Offshore/environmental%20liability.html](http://www.the-uk-oil-environmental-legislation.org/Contents/topic_files/Offshore/environmental%20liability.html)

recovered under OPOL or the amount of damage exceeds the limitation of the agreement. Provided damage is reasonably foreseeable, there is no limitation on liability under tort law, however pure economic loss generally not recoverable.

## **3.2 US Regime**

### **Overview**

The American offshore oil and gas operation is concentrated in the US Gulf of Mexico. In 2012, federal leases in the Gulf of Mexico produced 463 million barrels ( $73.6 \times 10^6$  m<sup>3</sup>) of oil, which made up 19.5% of all US oil production that year, and it is estimated that oil production from the Gulf of Mexico will increase to 686 million barrels ( $109.1 \times 10^6$  m<sup>3</sup>) per year by 2013.<sup>45</sup>

In the US, the legal framework governing activities on the Outer Continental Shelf (OCS) is comprised of an uncoordinated collection of numerous laws enacted by Congress over more than 200 years.<sup>46</sup> The Outer Continental Shelf Lands Act (OCSLA)<sup>47</sup> is the primary legislation regulating U.S. offshore regions, which provides federal jurisdiction for all offshore lands beyond the state limit. Apart from OCSLA, there are

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<sup>45</sup> US Minerals Management Service, May 2009, Gulf of Mexico Oil and Gas Production Forecast: 2009-2018, OCS Report MMS 2009-012, PDF file, p.21,

<sup>46</sup> Preben H. Lindøe eds, Robust Offshore Risk Regulation – an assessment of US, THE UK and Norwegian approaches (2012) 3p

<sup>47</sup> U.S.Code 4321 et seq

various regulations stipulating specific issues of operations in the offshore oil and gas industry such as Oil and Gas Royalty Management Act, which governs lease and royalty agreements.

The main governing bodies on offshore oil operation activities are as below:

1) Bureau of Ocean Energy Management (BOEM) and the Bureau of Safety and Environmental Enforcement (BSEE), which manage offshore oil production operations, in responsible of leasing offshore sites, collecting the royalties due the government, and permitting of operations.

2) Department of energy (DOE), which handles the Strategic Petroleum Reserve, conducts energy research, and gathers and analyses energy industry data.

3) U.S. Coast Guard is the main governing body to perform oil response, in charge of cleaning up.

4) Environment Protection Agency (EPA) is the main governing body to provide oversight for environmental, health, and safety issues.

#### Liability Regime

In THE USA, The Oil Pollution Act 1990 (OPA 90), paired with the The Clean Water Act 1972 (CWA) and state law, provides the legal framework for oil spill liability.

## OPA 90

The Oil Pollution Act (OPA) came into effect in August 1990 largely in response to the legal issues presented by the Exxon Valdez oil spill. This incident spilled 260,000 to 750,000 barrels (41,000 to 119,000 m<sup>3</sup>) of crude oil into Prince William Sound and was regarded as one of the most devastating human-caused environmental disasters.<sup>48</sup>

OPA 90 is a comprehensive statute that covers liability and compensation concerning all types of oil spills, covering oil spills from both the vessel resource and offshore facilities.

Under OPA, the “responsible party” is strictly liable (with specific exceptions ) for the damage and loss caused by oil pollution .The “responsible party” for an offshore facility is defined to be

“the lessee or permittee of the area in which the facility is located or the holder of a right of use and easement granted under applicable State law or the Outer Continental Shelf Lands Act (43 U.S.C. 1301-1356) for the area in which the facility is located ”

The compensation covered by OPA 90 is mainly two types (section 1002 (b) of OPA 90):

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<sup>48</sup> "Frequently Asked Questions About the Spill". Exxon Valdez Oil Spill Trustee Council. Archived from the original on June 30, 2007. Retrieved September 11, 2013.

1) Removal costs - It refers to the costs of removal and the costs “to prevent, minimize, or mitigate” oil pollution .The removal cost can be claimed by both federal, state authority and any person who took actions. Unlike setting \$23.5 million as the cleaning up fee limitation for vessel source pollution, there is no cap for removal cost incurred concerning the oil pollution arising from offshore facilities.

2) Compensation for damages natural resources, property , revenue and economic loss incurred .OPA sets clear that environmental damage is recoverable by a United States trustee .In addition, it worth noting that under OPA 90 , the pure economic loss incurred by private party is also recoverable .The liability limitation for damage concerning oil pollution arising from offshore facility is \$75 million.

The right to limit liability concerning offshore oil pollution damage should be deprived, if there is gross negligence or willful misconduct or a violation of some regulations.

The important point to note under OPA 90 scheme is that it requires the responsible party to establish evidence of financial responsibility for potential liabilities .33 U.S.C section 2716 (e) stipulates that in the case of an offshore facility , the amount of financial responsibility varies from \$10 million up to \$150 million “based on the relative operational , environmental , human health and other risks by the quantity or quality

of the oil "and the location of the facility ,(33 U.S.C section 2726 (c)(1)(c) ). Oil Spill Financial Responsibility (OSFR) is set in order to implement the authority of OPA 90.

Another point worthy noting is under OPA scheme, The Oil Spill Liability Trust Fund (OSLTF) is set up as a federally administered trust fund used to pay cost concerning the federal and state oil spill removal activities, costs incurred by federal , state and Indian tribe trustees for natural resource damage assessment , and unpaid damage claims . <sup>49</sup>This fund is mainly financed by Barrel tax which is collected from oil produced in or imported to United State.

### **The Federal Water Pollution Control Act (clean water act )**

The Act imposes liability for the costs of the removal, as well as for natural resource damages however claims for private loss are not included . The key feature of Clean Water Act is It also imposes administrative and criminal penalties for unlawful discharges and for failure to carry out orders issued under the Act. To be specific :

1)Administrative penalty : strict liability for Administrative penalty is imposed on the polluter and the maximum amount is \$190,000 .

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<sup>49</sup> 33 U.S.C. Section 2712 .

2) Criminal Penalties : The responsible party may face a fine varying from not more than \$25,000 per day to \$50,000 per day depending if it is a negligent violation or not . A prison sentence may be imposed as well .

### **State law**

OPA 90 does not preclude state action , therefore the damage exceeding the OPA limitation can be claimed through general tort law . There is no cap under tort law , however it should be noted that pure economic loss is normally unrecoverable .In addition, Under US general tort law regime , the responsible party may be imposed punitive damages based on fault liability .

## **3.3 Norway Regime**

### **OVERVIEW**

Norwegian offshore industry has over 40 years of production history since the first oil rig on the Norwegian continental shelf began to produce on June 15, 1971, at the Ekofisk field .

A comprehensive, well -designed legal framework has been established by Norwegian law maker to stimulate the oil industry interest in exploring in further offshore areas while to protect the environment at the same time.<sup>50</sup>

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<sup>50</sup> James Bamberg, The History of the British Petroleum Company 202 ,(Cambridge University Press 2000)

In Norway, both Constitution from the top-tier and Pollution Control Act<sup>51</sup> as a status impose a duty to avoid pollution and stipulate provisions on general protection of the environment and natural resources. The Norwegian offshore petroleum sector is characterized by a high activity level and a strong sense of safety

Though Norway is also a member state of OPOL, unlike THE UK applying the whole scheme into all offshore operators within THE UK territory, the OPOL agreement applies in Norway to one supply pipeline only. The issues on offshore facilities under Norwegian operation license are subject to national liability and compensation regime and the jurisdiction of the Norwegian courts.

The Petroleum Activities Act (Nov. 1996, No. 72) (PAA)<sup>52</sup> is the primary legislation regulating the offshore oil operation activities in Norway. A licensing system is regulated under this act.

### **Governing bodies**

The Storting (Parliament) is top authority in responsible for the framework of Norwegian petroleum activities, and the authority for

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<sup>51</sup> Act of 13 March 1981 No. 6 Concerning Protection Against Pollution and Concerning Waste, Government.no website, <http://www.regjeringen.no/en/doc/Laws/Acts/pollution-control-act.html?id=171893>

<sup>52</sup> Act of Nov. 29, 1996, No. 72, Relating to Petroleum Activities, last amended by 24 June 2011 No 38. No. 104, Norwegian Petroleum Directorate (NPD) website, <http://www.npd.no/en/Regulations/Acts/Petroleum-activities-act/> (last visited June 10, 2013);



implementing the various roles concerning offshore oil operation activities is spread among :

- 1) Ministry of Petroleum and Energy (MPE), the primary body for resource management
- 2) Ministry of Labor, it is charge of health, the working environment and safety.
- 3) Ministry of Environment, which is responsible for the external environment.
- 4) Norwegian Petroleum Directorate (NPD), NPD is subordinate to the MPE. Playing an important role as advisory body to the MPE.

### **Liability regime**

Chapter 7 of Petroleum Act stipulates detailed provisions related to the oil spill liability arising from offshore installment.

The licensees are hold strictly responsible (with limited exceptions)for the pollution damage from an offshore facility (art 7-3,para1 ) . Under Norwegian Regime, three key elements should be taken into consideration when assessing the scope of the oil pollution liability:

- 1) Functional scope - PA section 7-1

Subject to PA section 7-1, the pollution damages can be divided into two categories depending on the function .The first type is “damage or loss caused by pollution as a consequence of effluence or discharge of

petroleum from a facility, including a well". The second type is "costs of reasonable measures to avert or limit such damage or such loss, as well as damage or loss as a consequence of such measures" It should be noted that PA does not further specify the damage/loss and who could file the claim .However, PA stipulates it clear that "damage or loss incurred by fishermen as a consequence of reduced possibilities for fishing" is recoverable.(further discussion below )

## 2) Geographical scope - PA section 7-2

Further to section 1-4, PA section 7-2, para 1 stipulates pollution damage that takes place "in Norway or inside the outer limits of the Norwegian continental shelf or affects a Norwegian vessel, Norwegian hunting or catching equipment or Norwegian facility in adjacent sea areas" , chapter 7 also applies to "when the damage occurs in onshore or offshore territory belonging to a state which has acceded to the Nordic Convention on Environment Protection."(PA section 7-2 para 2)

## 3) Economic scope – PA section 7-3

Under PA ,The principle rule is there is no limitation for liability concerning the oil pollution arising offshore facilities .And it is strict liability for polluters on the damages ,however discretionary reduction of liability is available provided "it is demonstrated that an inevitable event of nature, act of war, exercise of public authority or a similar force

majeure event has contributed to a considerable degree to the damage or its extent under circumstances which are beyond the control of the liable party .”(PA Section 7-3, para 3)

The channeling of responsibility is regulated in PA section 7-4, claims to the licensee can be only filed pursuant to the PA, and the listed parties are shielded from liability. However If the licensee fails to pay the compensation, claims against the party that has caused the damage are allowed provided “to the same extent as the licensee may bring action for recourse against the party causing the damage.”(PA section 7-4 para 3&4).

PA further stipulates the licensee’s right of recourse in Section 7-5. The licensee is not allowed to claim recourse for damage that is exempt from liability under the liability channeling provisions, unless the person “or someone in his service has acted willfully or by gross negligence”.

Unlike THE UK and US regime where fisher’s interest is not sorted out separately , special rules for the compensation of Norwegian fisher are set in Chapter 8 of the PAA stipulates .Strict liability of licensees is also applied on financial losses suffered by fishermen without liability cap . Penal provision is regulated under section 10-17, “Willful or negligent violation of provisions or decisions issued in or pursuant to this Act shall be punishable by fines or imprisonment for up to 3 months. In

particularly aggravating circumstances, imprisonment for up to 2 years may be imposed”

A point to note is Proof of insurance is required as a precondition to get the operation license. According to the Regulations to the Petroleum Activities Act <sup>53</sup> stipulate that “the license shall provide reasonable insurance cover” (art. 73, para. 3). However no specific amount is set.

### **3.4 Common Denominators & Differences**

From the above analysis on each national’s liability regime, it is clear there are both common characters shared and differences existed among the three given jurisdictions.

To be specific, the common denominators are including:

- **polluter pays principle**

The most significant element in environmental Liability regime is “polluter pays principle” -whoever responsible for damage to the environment should bear the costs associated with it .Its main function is to internalize the social costs borne by the public authorities for pollution prevention and control. <sup>54</sup> Integrating this principle into offshore oil pollution liability regime can set a clear and appropriate

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<sup>53</sup> Regulations to Act Relating to Petroleum Activities (by Royal Decree of June 27, 1997, as amended by Royal Decree of Dec. 22, 2006, No. 1536), NPD website, <http://www.npd.no/en/Regulations/Regulations/Petroleum-activities/> (last visited June 18, 2010) (unofficial source).

<sup>54</sup> De Sadeleer, Nicolas Michel, The Polluter-Pays Principle in EU Law - Bold Case Law and Poor Harmonisation (2012).

deterrent mechanism that reflects the potentially hazardous nature of the petroleum industry and motivate the potential polluter to weigh the impact on environment more during their decision making. The “polluter pays principle” is followed by US, THE UK and Norway concerning oil pollution liability arising from offshore installment and is supported by strong civil penalty regime.

- **Channeling of responsibility**

A question is raised when applying the polluter pays principle - who should be identified as the polluter concerning the oil pollution rising from offshore pollution. Since offshore oil operation activity normally involves various parties: licensee, operator, contractor, and subcontractor. Depending upon the facts, the cause of an oil spill can be traced back to the responsible of operator, the drilling contractor, the facility manufacturer, or a combination of them .It is true that the broader the definition of polluter, the larger the potential pool of solvent defendants; however, the larger the pool of defendants the harder to know who to be sued. It would be very complicated and time-consuming for plaintiff to know who the defendant is. The difficulty to identify responsible party polluter can be solved by channeling of responsibility.

Channeling of responsibility stems from nuclear convention. It means the responsible party of damage is limited to the certain statutory channeled party , excluding the other parties from liability regardless of their contribution to the damage . Professor Hui Wang noted “it is a deviation from the general principle of tort law that the tortfeasor who has caused damage should be held liable.”

The channeling of responsibility in oil pollution liability regime was firstly adopted by 1969 conference .Instead of holding the tortfeasor liable, the registered shipowner is exclusively liable for the damage regardless of fault. <sup>55</sup>Then its influence is extended to the liability regime for oil pollution rising from offshore facilities as well.

The importance of channeling of responsibility in offshore oil pollution liability regime is that Similar to strict liability (it is discussed later), channeling of liability simplifies litigation by directing the the responsibility to specific party and making it quite clear to plaintiff who should be sued. The broadness of Channeling responsibility varies among the three given jurisdiction:

1) In Norway, Norwegian Petroleum Act has specific provision on the channeling of responsibility .Section 7-4 para 1 stipulates “The liability of a licensee for pollution damage may only be claimed pursuant to the

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<sup>55</sup> A.E. Boyle,GLOBALISING ENVIRONMENTAL LIABILITY: THE INTERPLAY OF NATIONAL AND INTERNATIONAL LAW,Journal of Environmental Law (2005) Vol 17 No 1, 3–26

rules of this Act.” It is designed to protect the licensee against claims under the general principles of tort law.<sup>56</sup> Para 2 is concerning the channeling part , which expressly states the parties excluded from this provision should be protected from liabilities .Para 3 stipulates the damaged party may bring action against the perpetrator of the damage only when licensee failed to pay .Norwegian Petroleum Act further stipulates the limited recourse right of the licensee , a licensee is not allowed to claim recourse for damage that is exempt from liability under the liability channeling provisions unless the pollution damages are caused willfully or by negligence of the person in question. (Section 7-5) 2 )Turning to US , Nathan Richardson comments that OPA 90 also “channels” liability of oil spills .However unlike providing a comprehensive provision of channeling liability , OPA 90 only specifies exactly who is to be treated without listing the parties excluded from the responsibility .<sup>57</sup> According to OPA 90 Section 6-5, the responsibility of offshore oil pollution is directly imposed on lessee or permittee. And in the case of Deep-water Horizon, the holder of the drilling permit, the lessee of the Macondo Prospect area BP is a responsible party.<sup>58</sup>

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<sup>56</sup> Hui Wang 2011 ,205P

<sup>57</sup> Nathan Richardson, ‘Deepwater Horizon and the Patchwork of Oil Spill Liability Law’ (2010) Resources for the Future <<http://www.rff.org/rff/documents/RFF-BCK-Richardson-OilLiability.pdf>> at 10 Oct 2013

<sup>58</sup> Ibid

however unlike Norwegian regime where “The liability of a licensee for pollution damage may only be claimed pursuant to Petroleum Act” , the channeling of responsibility under US liability regime is relatively limited and may be undermined as it is open to claimants to pursue alternative remedies outside OPA 90 , independently of the provisions of OPA 90.

3) Under THE UK and OPOL convention, like US there is no evident channeling responsibility clause however the channeling technique is used by stipulating the operator<sup>59</sup> is hold solely responsible for the acceptance and payment of all claims arising from the offshore oil spill.

It is also worth noting OPOL is not a legislation instead it is a voluntary industry compensation agreement scheme, aiming to provide prompt compensation mechanism . Companies are jointly and severally in case of insolvency.

Also OPOL does not prevent the victim to get alternative redress from the real wrongdoer through tort law, which is quite similar with US approach .

Though there are quite a lot discussions on the present allocation of liability between parties (contractor subcontractor and operators )under

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<sup>59</sup> Under OPOL “operator ” is the responsible party , definition of which is “a Person which by agreement with other Persons has been authorized to manage, conduct, and control the operation of an Offshore Facility, subject to the terms and conditions of said agreement, or which manages, conducts and controls the operation of an Offshore Facility in which only it has an interest. ”



contract law and the issue of Contractual indemnities<sup>60</sup>, the primary responsibility is imposed to the “operator (or licensee)” by national legislations through channeling of responsibility provision or using channeling technique , which is justified as the operator benefits from the exploitation and knows most of the facility and is in the best position to take preventive measures . After all, it is the operator that has control over all information and decision-making relating to the well and associated risks, and is responsible to the government for compliance with its regulatory requirements.<sup>61</sup>

- **Strict liability**

Strict liability imposes liability for harm suffered on responsible party without requiring proof of negligence. Daniel B. Shilliday comments “The rationale for strict liability is that it shifts the loss from the innocent to the responsible State which, in view of its presumed knowledge of the hazard created, is considered to be in a better position to decide whether or not the benefits of the activity are likely to outweigh its potential costs and provides a powerful incentive for the prevention of

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<sup>60</sup> Daniel B. Shilliday, Walter R. Mayer, John J. Michael and Andrew P. Slania, Contractual Risk-Shifting In Offshore Energy Operations, Tulane Law Review, Volume 81, Numbers 5 & 6, June 2007, 1579.

<sup>61</sup> Peter Cameron, (2012) ,Liability for Catastrophic Risk in the Oil and Gas Industry ,International Energy Law Review , Vol. 6, 2012, p. 207-219

accidents.”<sup>62</sup> Compared with the negligence approach, the advantage of strict liability is that it simplifies litigation and provides a fairly better protection toward the oil pollution victims.

In addition, strict liability normally goes with a rule of reversal of the burden of proof of the injurer's fault. In other words, the burden proof of fault is not relied on the claimant under strict liability scheme, which tends to favor the claimant since it makes their case somewhat easier than it might have been had it been necessary to prove intention or recklessness on the part of the operators.<sup>63</sup>

In all three given jurisdictions, strict liability is imposed for damage concerning offshore oil pollution. It is also worth noting that strict liability mechanism cannot supplant legal liability, but it does provide a means of dealing with claims that is simpler and more satisfactory to the claimant.

- Exoneration from liability

Though strict liability principle is imposed on responsible party in all three given jurisdiction, however specific defenses are also stipulated to exempt him from this.

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<sup>62</sup> Shane Bosma, (2011), THE REGULATION OF MARINE POLLUTION ARISING FROM OFFSHORE OIL AND GAS FACILITIES (master thesis) Retrieved from <https://maritimejournal.murdoch.edu.au/index.php/maritimejournal/article/view/>

<sup>63</sup> Neil Parpworth, 'Enforcing Environmental Laws: The Role of the Private Prosecution', Journal of Planning & Environment Law 2007, p 334; 'Case Law Analysis' 18 Journal of Environmental Law 119, March 2006; Express Ltd (trading as Express Dairies Distribution) v Environment Agency [2005] Env LR 7.

1) Subject to OPA Section 2703, The responsible party is not liable if the discharge is “solely” caused by: “(1) an act of God; (2) an act of war; (3) an act or omission of a third party other than an employee, agent or contracting party of the responsible party (4) any combination”

2) Turning THE UK, OPOL Clause IV-b stipulates “No obligation shall arise hereunder with respect to Remedial Measures and/or Pollution Damage arising from an Incident if the Incident: 1) an act of war, 2) was wholly caused by an act or omission done with intent to cause damage by a third Person; 3) was wholly caused by the negligence or other wrongful act of any Government or other authority in compliance with conditions 4) resulted wholly or partially caused by an act or omission done with intent to cause damage by a third Person

3) Norwegian Petroleum Act provides legal basis for discretionary reduction of liability. As per PA Section 7-4 para 3, the polluter’s liability may be reduced “to the extent it is reasonable” in cases of “a force majeure or the exercise of public authority” contributing “to a considerable degree to the damage or its extent,” And to what extent the reduction can be given depending on “the scope of the activity, the situation of the party that has sustained damage and the opportunity for taking out insurance on both sides” .

- **Oil spill financial solvency**

A strict liability rule can be considered efficient only if there is no insolvency risk. <sup>64</sup>Indeed, without sufficient solvency, the liability regime faces under deterrence.

The three given jurisdictions all request the operator /licensee to provide sufficient proof of finance assurance in order to demonstrate the risks of the operation have been appropriately estimated and that the financial mechanisms are in place to meet to cover major incidents.

The proof of finance is the precondition to grant offshore drilling license in all three nations .When evaluating the existing financial security instruments, the financial ceilings and complemented risk-coverage instruments also need to be taken into consideration.

1) US stipulates the amount of such a financial guarantee based on Worst case scenario. <sup>65</sup>It is assumed that the worst spill will last 4 days and total spill is between 1,000 and 35, 000 barrels of oil. Responsible parties for offshore facilities in federal waters must demonstrate \$35 million financial responsibility, as any volume greater than 105,000 barrels; the cap is \$150 million. (33 U.S.C. 2716(c)).

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<sup>64</sup>Faure, Michael G. and Hui, Wang, Civil Liability and Compensation for Marine Pollution - Lessons to Be Learned for Offshore Oil Spills (December 22, 2011). Oil, Gas & Energy Law Intelligence (OGEL), Vol. 8, No. 3, September 2002. P12p

<sup>65</sup> The worst discharge for a well is defined as “four times the estimated uncontrolled flow volume for the first 24 hours of a spill, as set forth in the responsible party’s response plan ”

2) OPOL requires all members to submit evidence of financial responsibility. Depending on the location of the well, its depth, water depth and the geological environment , using 'worst case scenario' approach, four levels of the financial responsibility have been set: Band 1: US\$250 million, Band 2: US\$375million, Band 3: US\$500 million and Band 4: US\$750 million.<sup>66</sup>

3) The Norwegian Petroleum Activities Act requires operators to have in place insurance that covers damage to facilities; pollution damage; and wreck removal and ensure that its contractors and employees are also sufficiently covered .The MPE may consent to the licensee using another form of security arrangement.

It can be seen from above , that the basis for the proof of financial solvency varies from each nation , US is based on worst Worst case scenario , THE UK approach is more flexible and the definition of appropriate 'financial capacity' is estimated case by case , while Norway sets the specific requirements are for insurance to at least cover the items listed .

In order to achieve efficient financial solvency, Both THE UK and THE USA allow a set of alternative or complementary financial instruments at operator's flexibility and choice.

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<sup>66</sup> Mandatory Financial Requirements for Oil Industry Operations in the UKCS , available at <https://www.gov.uk/.../7265--financial-responsibility-guidelines.doc>

The various methods are as below

- 1) Insurance / warranties and guaranties,
- 2) Self-insurance and private funds,
- 3) Public funds.

By contrast, in Norway insurance is preferred and using another form of security agreement needs the consent from MPE.

### **Differences**

- **The first difference is in the liability cap**

It can be easily seen from the above discussion that:

- 1) There is no limited liability for clean-up in Norway and THE USA .The remedial measures cap in THE UK is \$125 million per incident.
- 2) Regarding the damage, THE UK OPOL sets pollution damage limitation up to \$125 million per incident, and under OPA 90 the liability limitation for damage concerning oil pollution arising from offshore facility is \$75 million. By contrast, no limitation has been set in Norway.

As to the UK and the USA which set liability limitation, a question may rise here whether cap fails to adequately reflect the potential damages. There is voice to lift it as the cap may discourage the operator's incentives to adopt cost-effective safety precautions and it provides inadequate compensation for damages.<sup>67</sup> In addition, like what the

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<sup>67</sup> Dyna Tuytel and Patrick Dyke , Encouraging Pollution: The Perils of Liability Limits ,2011 available at <http://probeinternational.org/library/wp-content/uploads/2012/01/limited-liability-paper.pdf>

Deepwater Horizon incident has demonstrated, the limitation can be illusory because it does not take much, in terms of 'bad behavior', for those caps no longer to be available to the polluter.<sup>68</sup>

**The main differences in liability regime of the three given jurisdiction is on the scope of compensation.**

Generally speaking, the responsible party for a pollution incident may, in any given jurisdiction, face the following liabilities:

(a) The costs of cleaning up

Cleanup costs are often directly correlated with spill impact, particularly shoreline impact, so that reducing the spill impact can result in reducing the spill response costs (Elkin, 1998b,c). Efficient cleaning up can significantly eliminates the damages to natural resource and reduces the amount of property damage claims.

(b) The costs of restoring the natural resources

It is obvious that oil pollution can cause various damages to the environment including deterioration, destruction or loss of natural resources. As mentioned above Clean-up can reduce environmental damages to some extent , however itself is always far from being sufficient to compensate restoration of damaged natural resources fully .Although there are many questions concerning the the coverage of

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<sup>68</sup> Nigel Chapman , Tim Taylor ,Leigh Williams , Liability Regimes around the world . 4p Available at <http://www.scribd.com/doc/133600234/Pollution-Regulatory-and-Liability-Regimes-Around-the-World>

resorting the natural resources and the criteria used to assess the damage varies from each jurisdiction , the liability for restoring the natural resources is tended to be covered by specific statutory law .

(c) The costs of property damage

Oil pollution may cause a reduction in the value of public or private property, and this part of value reduction is usually measured, for produced goods, by cleanup costs or costs of replacement if cleaning of the polluted property is not feasible. ( Shavell, 1987) .

(d) The economic loss

The economic loss refers to both consequential loss and pure economic loss. The former usually means financial loss sustained by a claimant as a result of physical loss of or damage to property caused by contamination. And the latter comprises the indirect loss arising from the oil pollution such as reduced tourism income due to the polluted coastline. The compensation of economic loss is normally dealt by the law tort.

(e) Punitive damages

Black's Law Dictionary presents the following definition on punitive damages:

“The combined total of monetary losses actually sustained and additional monetary losses that can be inferred from facts and circumstances of the case.”



In the case of oil pollution, unlike compensatory damages, punitive damage awards are controversial and far from being universally accepted, it varies from nation to nation.

In Norwegian legislations, there is no provision for punitive. <sup>69</sup>Prof. Bjarte Askeland of the University of Bergen, reaches the conclusion that generally punitive damages “do not have a tradition” under Scandinavian law .Norwegian law does not recognise the concept of punitive damages .THE UK permits punitive damages to a limited extent . In practice it is quite rare for THE UK court to award it.<sup>70</sup>

By contrast, punitive damages in the U.S. are frequently sought and huge awards .Though OPA remains silent on the availability of punitive damages, the plaintiffs is allowed to seek it under general maritime law, provided the wrongdoer is out of "gross negligence." .In the case of the Gulf of Mexico oil spill , the court of Louisiana has allowed US fisherman and businesses suffered from the pollution to seek punitive damages from BP, Halliburton, Transocean Ltd., and a host of other defendants.<sup>71</sup>

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<sup>69</sup> According to a survey of Swiss Re -“Punitive damages in Europe: Concern, threat or non-issue? ”The countries do not have punitive damages include Austria, Denmark, France, Finland, Germany, Hungary, Italy, the Netherlands, Norway, Poland, Spain, Sweden, and Switzerland

<sup>70</sup> Damages in the UK are usually awarded on a compensatory basis ,The key case for punitive damages in UK is *Rookes v Barnard* [1964] AC 1129 .

<sup>71</sup> The Judge Barbier's order is available at <http://www.laed.uscourts.gov/OilSpill/Orders/8262011RevisedOrder%28MotionsToDismissB1Complaint%29.pdf> .

(f) Administrative penalties and / or criminal fines

Usually acting as deterrence to punish the polluter for his polluting behavior payable to the state. In all three jurisdictions, Administrative penalties and criminal fines are imposed by specific provisions.

The specific differences are as below

1) Under OPA section 1002, there are six categories of recoverable damages, namely: removal and government response costs, property and natural resource damages, and economic losses resulting from the oil spill ,Loss of taxes, royalties, rents, fees or net profit shares. It should be note that pure economic loss is recoverable under OPA 90.

2) In the UK and OPOL regime , removal fee is recoverable , and Pollution damage is defined as “ direct loss or damage by contamination which results from a discharge of oil. ” However how to define “direct ”is unclear .In practice , Claims to be considered as admissible would fall into the following categories: 1) Clean up operations on shore or at sea. 2) Property damage 3) Disposal costs of collected material 4) Other losses which must be quantifiable and which must result directly from the contamination itself.

Particular consideration is given that Claims must be reasonable, quantifiable and justifiable . In addition , personal injury is not covered under OPOL .

3) Similar with OPOL 's compensation scope, Norwegian Petroleum Act covers the removal cost and the loss or damage caused by the pollution . Besides , “ incurred by fishermen as a consequence of reduced possibilities for fishing ” is also included .

To sum up , It can be seen that The American liability regime concerning the oil pollution arising from offshore facilities has a broader scope of compensation .Firstly , OPA opens the door for indirect economic losses, for example damage claims for entertaining industry around the polluted area .Secondly , the US maritime law allows for the possibility of punitive damage .

If one wants to compare the efficiency of all the three regimes, the Norwegian regime shall be considered the most efficient as it provides a streamlined claim for the victims through clear channeling clause and strict liability , at the same time it still allow recourse against those ultimately responsible for causing a spill . In addition , Unlike US and THE UK , there is no limitation cap in Norwegian regime , which can ensure all claims are made in one venue without letting the exceeding limitation part to apply tort law . In this way , the litigation can be simplified in most cases .

## 4 Chinese Offshore Oil Pollution Compensation Regimes

### 4.1 Introduction

As a growing power, China has an increasingly high demand of oil. By 2013 Sep, China has surpassed US to be the largest oil importer.<sup>72</sup> And In term of oil consumption, China is the second. With the need for oil surging , China offshore oil industry started to flourish after reform and open policy adopted .And the establishment of China National Offshore Oil Corporation (CNOOC) On 15 February 1982 ,was a milestone for China's offshore oil industry .Due to the booming economy and high dependency on oil , China aims to significantly increase the offshore oil production .CNOOC as the largest offshore oil operator ,has set a net production target of 338-348 million barrel for 2013, compared with 341-343 million barrel in 2012, anticipating the start-up of 10 oil and natural gas fields offshore China .<sup>73</sup>

This chapter analyzes the adequacy and efficiency of China's liability regime relating to oil spill arising from the offshore facilities In the light of Bohai oil spill incident .Before going deep to exam specific issues on liability regime , it is necessary to have a general view of current China

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<sup>72</sup> See Patrice Hill "China will surpass U.S. in oil imports; shift in supply and demand could transform geopolitics ,The Washington Times , available at <http://www.washingtontimes.com/news/2013/aug/12/china-will-surpass-us-in-oil-imports/?page=all>

<sup>73</sup> See oil & gas journal "CNOOC expects production to jump in 2013" <http://www.oil & gas journal.com/articles/2013/01/cnooc-sets--12-14-billion-capital-budget-for-2013.html>

legal environment related to offshore oil operation activities . At the end of this chapter, recommendations are given on reform or perfection of the legal regime on offshore drilling in China by drawing the successful experiences and practice from other countries.

#### 4.2 2011 Bohai Bay oil spill

Penglai 19-3 oilfield (PL19-3), the largest offshore oilfield in China ,caused two unrelated oil spill in 4th June 2011 .It is estimated that approximately 723 barrels (115 cubic meters) of oil and 2,620 barrels (416 cubic meters) of mineral oil-based drilling mud seeping into Bohai Bay. And according to ConocoPhillips China, they state: “The original seep sources were identified and sealed, and the vast majority of mineral oil-based mud that was released to the seabed was recovered. Since June 19, 2011, less than three barrels (one half of a cubic meter) of oil has been released from the remaining sea bed. ” <sup>74</sup>

The oil field in cooperation with foreign countries by China National Offshore Oil Corporation (CNOOC)<sup>75</sup> and ConocoPhillips China Inc. Cooperative exploration and development of oil of the sea in, have the rights and interests of 51%, ConocoPhillips<sup>76</sup> owns 49%. According to

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<sup>74</sup> <http://www.conocophillips.com.cn/EN/Response/Pages/default.aspx>

<sup>75</sup> China National Offshore Oil Corporation ("CNOOC"), the largest offshore oil and gas producer in China, is a mega government owned company .It is the third largest oil company in china, the core business is the exploitation, exploration and development of crude oil and natural gas in offshore China.

<sup>76</sup> ConocoPhillips China Inc. (COPC) is a wholly-owned subsidiary of ConocoPhillips.

the contract between the parties , ConocoPhillips China is operator of this field .Bohai Bay , the largest oil and gas production base offshore China , is semi-closed inland sea with low self-purifying capabilities. The sea is one of the largest fisheries resources in China with distinct productivity, strong fishing activity and complicated relationship of food web .Many Communities around Bohai Bay including Liao Ning , He Bei , Shan Dong and Tian Jin Provinces live on Fisheries and mariculture which suffered dramatically in this incident .Bohai Bay area is one of the fast-growing industrial regions in China with an area of 2.11 million square km and a population of 290 million . With ever expanding offshore oil development, the Bohai Sea has become China's offshore oil gulf.

With Delay of more than one month after oil spill detected, ConocoPhillips China did not conceal the accident until July 5th. Then China's State Oceanic Administration (SOA)-the highest marine regulator in China ordered ConocoPhillips China to immediately suspend its oil production operations of Penglai 19-3 oilfield. The move came 39 days after two oil spills . Both the accused concealment of incident by ConocoPhillips and the slow response from regulating body revealed the fact that China was not ready for a big oil spill like this , oil spill response mechanism was deficient .

On July 21, 2012 , the Investigation report on this oil spill incident was delivered by the Joint Investigation Group led by SOA . The report points out : “ ConocoPhillips in the operating process of violation of the overall development program for oil fields in the system, and exists on management of lack, should foresee the risk has not taken the necessary precautions, eventually leading to oil spill. Penglai 19-3 oil spill accident is causing a major oil spill pollution liability accident.” <sup>77</sup>The oil spill is known to have affected an area of about 6,200 square kilometers , , and 840 square nautical kilometers is heavily polluted , which is almost two times bigger than Oslo, resulting in severe damage to marine environment and local fisheries .<sup>78</sup>

The oil spill revealed many loopholes within China’s policies and regulations, and there is a highly compelling need to fill these gaps

As per the Investigation report, the liabilities caused by Penglai 19-3 oil spill incident can be sorted out into four categories:<sup>79</sup>

#### 1) Liability for cleaning up

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<sup>77</sup> Penglai 19-3 oil spill accident investigation report (full text)

<http://www.scribd.com/doc/109227312/State-Oceanic-Administration-Report-of-Joint-Task-Force-on-Peng-Lai-19-3-Oilfield-Accident>

<sup>78</sup> State Oceanic Administration , China Ocean Development Report 2012 , Beijing , Ocean Publishing House , 2012 , pp 231-232 .

<sup>79</sup> Dan liu , Revisiting China’s Legislation on Compensation for Marine Ecological Damages : lesson learned from Penglai 19-3 oil spill ,2013 ,P 2 Retrieved from <http://www.hksoa.org/contents/attachments/Presentations/2013/IFSPA2013/Papers/M14.pdf>

Requirements to stop the leak and clean up the polluted area were set by the State Oceanic Administration, COPC was identified to take the responsible of cleanup by SOA and CNOOC was requested to assist .By the end of August , the cleaning up was completed . It is estimated that USD 200 million (RMB 1.3 billion) was spent on response and clean-up activities.<sup>80</sup>

## 2) Liability on marine ecological damages

An agreement reached on June 2012 between SOA as the governing body of marine environment and CPOC&CNOOC as the owner of Penglai19-3 oil rig .According to the agreement “ COPC and CNOOC agreed to pay an aggregate amount of RMB 1.683 billion , RMB1.09 billion of which paid by COPC is used to compensate the marine ecological damage , at the same time CNOOC and COPC paid 480 million yuan to establish environment protection fund <sup>81</sup>and 113 million yuan, respectively, to serve the social responsibility for environmental protection of Bohai Bay .” <sup>82</sup>

## 3) Liability on fishing loss

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<sup>80</sup> See more on <http://www.conocophillips.com.cn/EN/Response/Pages/default.aspx>

<sup>81</sup> The CNOOC fund will be spent on projects of marine environmental protection, scientific research and technology development on the marine eco-system, and it will also support marine-related international cooperation, as well as some other public welfare projects .

<sup>82</sup> See “Investigation Report on the oil Spill Accident of Penglai 19-3 platform conducted by the joint investigation Group ” , retrieved from <http://www.soa.gov.cn/>



Another agreement has been reached between governing body on fishery resource -Ministry of Agriculture and Government of Liaoning and Hebei on one side and CPOC on the other side .Under this agreement,“COPC would pay 1 billion to settle claims of losses related to marine products cultivation and natural fishery resources in the affected areas of the Hebei and Liaoning provinces. COPC and CNOOC will also designate a portion from their committed marine environmental and ecological protection funds, which are RMB 100 million and RMB 250 million, respectively, to be used for natural fishery resources restoration and preservation, fishery resources environmental monitoring and assessment, as well as related scientific research work.”<sup>83</sup>

#### 4) Liability for Administrative Penalty

On September 1, 2011, The State Oceanic Administrative Department ordered an administrative penalty decision of a fine of RMB 200,000 yuan (\$29,850) on ConocoPhillips China subject to Art.85 of the Marine Environment protection Law<sup>84</sup> , though this oil spill had been regarded as the most severe marine pollution.

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<sup>83</sup> Ibid

<sup>84</sup> Marine Environment Protection Law of the People's Republic of China (1999) , Article 85 :Whoever, in violation of the provisions of this law, undertakes to conduct offshore oil exploration and exploitation causing pollution damage to the marine environment, shall be warned by the competent State administrative department in charge of marine affairs and be fined not less than 20,000 yuan and no more than 200,000 yuan.

### 4.3 Regulatory Authorities

There has been a lack of single regulatory body with sufficient functions to formulate, implement a national oil & gas policy and administer the country's offshore oil industry.<sup>85</sup> Though some reforms have been carried out on restructuring of the government agencies, the current oversight in offshore industry is still fragmented among various different government agencies. It is a fact there are a complex array of agencies and organizations in charge of offshore oil industry and the responsibility scope of each is quite unclear.

The main authorities are including:

The National Development and Reform Commission (NDRC)

NDRC is the general regulatory body for all projects in China, including the offshore oil operation project. The main responsibilities of NDRC include: determining the key offshore oil operation development plan, examining and approving the blocks for Sino-Foreign Cooperation .

The Ministry of Land and Resources (MLR)

MLR is primarily charged with regulating oil and gas within China. The main regulatory body of Granting exploration/exploitation licenses and regulating the transfer of licenses is MLR .

Ministry of Commerce (MOFCOM)

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<sup>85</sup> David Blumental, Tju Liang Chua and Ashleigh Au, Upstream Oil and Gas in China, Doing Business in China, (2009) pgs. V-3.1 – V-3.33 ,p14

MOFCOM is responsible for reviewing and approving the contracts with foreign participation.

State Oceanic Administration (SOA)

SOA is responsible for the management of the national marine affair .

State Maritime Administration (SMA)

SMA is the primary body in charge of maritime safety and pollution control.

The Ministry of Environmental Protection (MEP)

MEP is in charge of administering environmental policy and legislation in China.

#### 7) State Administration of Work Safety

The State Administration of Work Safety is in charge of overall supervision and regulation of work safety.

Though there are various departments to monitor the offshore oil operation an activity, the dismal reality is at the national level lines of responsibilities between regulating authorities are quite unclear. The authority of regulating offshore oil operations is spread through the multi-layered government system; therefore little concrete effect can be produced. In addition, The division of responsibilities among regulating bodies is often unclear and overlapping, Such as MEP and SOA, SOA and SMA , the consequence of which is governing system is largely

fragmented with poor coordination or even competition. When it comes to a serious scenario such as oil spill , the allocation of responsibility under the unsystematic coordination is usually handled through ad hoc discussion between agents , thus excessive bureaucracy prevented effective action .

For example, in the case of Bohai oil spill. When the spill happened State Oceanic Administration (SOA) was uncertain about its role in dealing with this case, as Ministry of Environmental Protection (MEP) was supposed to play an overall supervision and coordination role. Thus it was not until a month later after the spill incurred, did the SOA take firm action to monitor this case. In addition due to low technology used in oil spill prevention and response , SOA failed to locate the oil spill in time and caused the delay of clean-up .<sup>86</sup> Furthermore, the investigation group was led by SOA, a sub-ministerial body, which according to the regulations should coordinate other ministries.<sup>87</sup> This misalignment of levels would certainly affect the effectiveness of the coordination.<sup>88</sup> There are also concerns regarding the scope and depth of the investigation. Since it was led by SOA with participation of seven

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<sup>86</sup> CCICED Annual General Meeting 2012, China's Marine Environmental Management Mechanism -Based on Case of Bohai

<sup>87</sup> Ibid

<sup>88</sup> Ibid

administrative bodies and ministries , the absent participation of the relevant coastal provinces and departments may cause the insufficiency in collecting the first hand data as local fishermen and victims of the oil pollution usually seek redress through the coastal departments.

As per CCICED 2012 report , it summaries the biggest deficiency in current China administration structure is “ administrative supervision and management system neither clarify the liability of the responsible party nor foster an appropriate quality assurance system through imposing strong obligations .” In addition , it is bureaucratic politics and rising tensions between various ministries that prevented the implementation of efficient environmental regulation. <sup>89</sup>

#### 4.4 Overview on Domestic legislation

It's nearly 3 years since the oil spill accident of Penglai 19-3, but the negative effect of this oil spill has been lasting .Though the agreements have been made , cleaning up has been completed and part of compensation has also been paid by CPOC <sup>90</sup>, the discussions in light of this incident are still in process - the central point is whether current domestic legislations on offshore oil operation is competent enough .

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<sup>89</sup> Michael Faure, Effectiveness of Environmental Law: What Does the Evidence Tell Us?, 36 Wm. & Mary Envtl. L. & Pol'y Rev. 293 (2012), <http://scholarship.law.wm.edu/wmelpr/vol36/iss2/2>

<sup>90</sup> On May 8th , 2012 , ConocoPhillips made the first payment to SOA subject the agreement between two parties .

On one hand , as the world's second-largest crude oil consumer , Chinese government has been encouraging the development of offshore oil exploration and exploitation industry with increasing number of oil rigs built up year by year . On the other hand , the challenges have been presented by incidents such as Bohai Bay 2011 oil spill - current China legal framework fails to provide effective, robust monitoring on complex offshore operations, no comprehensive and reliable liability regime exists . Therefore there is a compelling need to reform on regulations .Before turning to making suggestions to better stipulate the China's legislations, the overall legal environment on offshore oil operation activities is necessary to exam.

Generally, the legal system in China has come under criticism “for its lack of transparency, ill-defined laws, weak enforcement capacity, and poorly trained advocates and judiciary.”<sup>91</sup>In addition, the Chinese have shown a historic preference for mediation, and thus, more often than not, polluters do not have to defend themselves in court.<sup>92</sup>

The governing framework for oil spills in China currently is still a combination national and local laws rules and standards ,Within which

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<sup>91</sup> ELIZABETH C. ECONOMY, *THE RIVER RUNS BLACK: THE ENVIRONMENTAL CHALLENGE TO CHINA'S FUTURE* 9–10 (2004) ,supra note 27, at 101p

<sup>92</sup> Ibid

various government agencies have the authority to stipulate oil spill regulations.

#### Exploitation of offshore oil resources

The petroleum resources within the People's Republic of China are vested in the state .PRC Mineral Resources Law (MRL) is the primary law regulating the mineral resources exploitation and exploration activities covering both in land and offshore sectors .Under MRL , any party seeking to exploit petroleum resources must register with the Ministry of land and resources (MOLAR) which is also the authority to grant the operation licenses .<sup>93</sup>The MRL also regulates general rules on legal liability for resource developer, and compliance with labor and environmental laws.

The Regulations of The People's Republic of China on the Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises (Offshore regulation) is the primary regulatory structure governing foreign partnerships with China National Offshore Oil Corporation.<sup>94</sup>

When it involves in foreign investment , the Exploration blocks have to approved by the State Council .The Chinese partner is responsible to apply for the exploration license, which is valid for up to 7 years and may

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<sup>93</sup><http://www.ogj.com/articles/print/volume-102/issue-34/general-interest/a-look-at-chinas-upstream-rules-and-regulations.html>

<sup>94</sup> CNOOC has exclusive and overall responsibility for the work of exploiting offshore petroleum resources in China in cooperation with foreign enterprises .

be extended for up to 2 years at a time. In order to get exploration license, sufficient Supporting documents are requested which include a plan for the exploration plan, qualification evidence of the operating partner. Offshore Regulation is supplemented by Provisions of the Ministry of Petroleum Industry of the People's Republic of China for the Control of Data concerning the Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises regarding the data control on sino-foreign petroleum exploitation projects.

Safety regulations for offshore oil operation activities

China has an extensive set of safety laws and regulations regarding the offshore operation activities which include the following:

- 1) Law of the People's Republic of China on Work Safety
- 2) Law of the People's Republic of China on Prevention and Control of Occupational Diseases
- 3) Announcement Of China Offshore Oil Operation Safety Office
- 4) Safety Rules For Offshore Fixed Platforms
- 5) The Provisions on the Survey of Offshore Oil and Gas Production Facilities of the Ministry of Energy of the People's Republic of China
- 6) The Provision of Safe Operations on Offshore Petroleum Industry
- 7) The Regulation of Safe Operation on Offshore Petroleum Industry



## 8) The Safety Control Provisions on Offshore Petroleum Operations of the Ministry of Petroleum

Industry of the People's Republic of China.

### Environmental protection

Article 26 of the constitution of the People's Republic of China from the top tier set the importance of environmental protection requires that "the state protects and improves the environment in which people live and the ecological environment .It prevents and controls pollution and other public nuisance." <sup>95</sup> As noted by one scholar, "China's environmental protection regime is comprised of approximately twenty laws, forty regulations, five hundred standards, and six hundred other legal norm-creating documents related to environmental protection and pollution control." <sup>96</sup>

Among these various environmental protection laws, the ones regarding the offshore oil operation activities are as below:

A) Laws particularly promulgated to protect marine environment.

As far as offshore pollution incidents are concerned, the key substantive

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<sup>95</sup> Wang Canfa , Chinese Environmental Law Enforcement : Current Deficiencies and Suggested Reforms , 8 Vt .J.Envtl.L .159.2009

<sup>96</sup> PHILLIP STALLEY, FOREIGN FIRMS, INVESTMENT, AND ENVIRONMENTAL REGULATION IN THE PEOPLE'S REPUBLIC OF CHINA 1 (2010). *supra* note 25, at 22p

laws consist of the PRC Marine Environment Protection Law (the "MEPL")

<sup>97</sup>and the PRC Tort Law. <sup>98</sup> <sup>99</sup>

B) Administrative Regulations adopted by State council which include:

Regulations on the administration of Environmental protection in the exploration and Development of offshore petroleum,

Regulations on Prevention and Treatment of the pollution and damage to the marine environment by marine engineering construction projects.

Regulations on Control over-dumping of wastes in the ocean.

C) There are also various rules, Standards stipulated by the ministries or departments of the State Council or local government

To sum up, The current legal framework of China in Oil and Gas upstream industry fails to provide a comprehensive Petroleum law regulating the exploration and exploitation activities. Due to no overarching petroleum law , the legal framework is a patchwork with weakness in each legislation .The standards and regulations on China

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<sup>97</sup> enacted in 1982 and amended in 1999,

<sup>98</sup> enacted in 2009.

<sup>99</sup> G Ping and Lujun Zhao, 'The Legal Protection of the Marine Environment in China: Current Situation and Challenges' in Faure MG and Hu J (eds), *Prevention and Compensation of Marine Pollution Damage* (Kluwer Law International, The Netherlands, 2006) 289

offshore oil industry are still ,to an large extent , based on governmental supervision, auditing by the third party, and responsible for safety operation by the operators.

#### 4.5 Liability and compensation regime

##### **Brief overview of liability regime**

The only international convention concerning marine oil pollution that China ratified is the 1969 and 1992 Civil Liability with 1992 Fund Convention only applicable to the Hong Kong Special Administrative Region. However being a member of CLC 92 convention does not help to solve the problem in offshore oil pollution liability regime .Firstly, Oil platform is not included in the object scope of CLC 92 which applies to vessel source oil pollution . In addition, no unambiguous rule in Chinese law on how the international conventions should be applied in China.

<sup>100</sup>In practice, confusion arises regarding when should international convention be applied, and when the domestic law should be given priority.

Turning to domestic law , the legal framework in China still is not competent to provide specialized legislation to regulate offshore drilling operation neither specials rules concerning oil pollution liability have been made . Therefore, the general tort law and civil law, environment

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<sup>100</sup> Hui Wang ,217p

protection statutes are the main sources of offshore oil pollution liability regime.

It should also be noted that in practice, the Supreme Court of the People's Republic of China published a series of judicial interpretations and documents, amongst are Summary of the Second National Working Conference on Foreign-related commercial and maritime trials (2005) and Regulation on the Trials of the compensation on Oil Pollution Caused by vessels (implemented from July 2011) which are especially important as guidance for the inferior courts to deal with the compensation claims for marine ecological damages.<sup>101</sup> The rationale in these two docs may have reference value to the liability on offshore oil pollution.

### **Challenges in light of Bohai Oil Spill**

One may clearly see that the Bohai Oil Spill incident highlighted the weakness in China's current offshore oil operation activities legislations, revealed the legal framework was an ineffective patchwork with weaknesses in each law.

### **Definition of responsible party**

One fundamental issue exists in the offshore oil pollution liability regime is the unclear definition of "responsible party". Though it has been

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<sup>101</sup> Dan Liu, 11 p

promulgated within various Chinese Laws, none of them succeeds to solve this problem clearly.

The General Principles of the Civil Law of the People's Republic of China (hereinafter referred to as the General Principles of the Civil Law)<sup>102</sup> regulates in general that "Any person who pollutes the environment and causes damage to others in violation of state provisions for environmental protection and the prevention of pollution shall bear civil liability in accordance with the law." (Article 124).

Articles 65 and 68 of the Tort Law of the People's Republic of China provide that the "Where any harm is caused by environmental pollution, the polluter shall assume the tort liability" and "Where any harm is caused by environmental pollution for the fault of a third party, the victim may require a compensation from either the polluter or the third party. After making compensation, the polluter shall be entitled to be reimbursed by the third party."

While Article 41 of the Environmental Protection Law of the People's Republic of China provides that "A UNIT that has caused an environmental pollution hazard shall have the obligation to eliminate it and make compensation to the unit or individual that suffered direct losses."

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<sup>102</sup> Adopted on 12 April 1986, and came into effect as of 1 January 1987.

Under both Tort law and Environmental Protection law the responsible party for damage is identified by vague express “polluter”, however the specific definition of polluter is absent in both statutes .

Article 90 of the Marine Environment Protection Law of the People's Republic of China stipulates “Any party that is directly responsible for pollution damage...shall relieve the damage and compensate for the losses.” Compared with the definitions in the OPOL, OPA, and PA, the simply wording “those who cause pollution damage” is so general and vague that fails to guide the identification of responsible party. Though it complies with “polluter pays principle”, without an accurate definition of “polluter”, it remains doubtful whether it can be effectively implemented in practice.<sup>103</sup>

Under the Regulations of the People’s Republic of China concerning Environmental Protection in Offshore Oil Exploration and Exploitation (Referred as Offshore Regulation below ), the responsible party is defined as “The enterprise , institution or operator who has violated Marine Environment Protection Law and the present Regulations ” .however there is no further definition of operator in this regulation . The only available definition of operator is found in Marine

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<sup>103</sup> Hui Wang 2011 , 221 p

Environment Protection Law is "an entity engaged in operations of offshore oil exploration and exploitation" .

Therefore, the only unambiguous clue on identifying the responsible party is, according to the Offshore Regulation and MEPL, it is the operator to assume the liability for violating the MEPL .However, Whether MEPL is applicable to civil liability is debated. Some Chinese scholars<sup>104</sup> hold that the MEPL is an administrative statute in nature, while the compensation for oil pollution damage is a civil law issue to which only the civil statutes should be applicable and not the administrative law. The majority clauses of MEPL are related to the supervision and administration of activities that might have an influence on the marine environment. <sup>105</sup>For instance, Chapter II Is regarding each government agency's function in Supervision and Administration of the Marine Environment .In this case , it is justified to apply MEPL to impose administrative fine on operator (for the case of Bohai oil spill ,it is COPC) However it is debatable to identity operator as responsible party for civil liability .<sup>106</sup>

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<sup>104</sup> Wang Yan, Wang Song, Liang xiaolong , Legal liability in Bohai oil spill , available at [http://views.ce.cn/main/qy/xzgl/201112/16/t20111216\\_22925199.shtml](http://views.ce.cn/main/qy/xzgl/201112/16/t20111216_22925199.shtml)

<sup>105</sup> Hui Wang 2011 ,218 p

<sup>106</sup> ZHANG Liying, LIU Jia The Accountability of the Offshore Drilling Platform's Oil Pollution Damages in the COPC Incident: In Comparison with the United States Gulf of Mexico Oil Spill Incident, China Oceans Law Review, Volume 2011, Number 2 ,151-165

In case MEPL as an administrative law is not applicable for civil liability , it falls into the scope of general tort law .However Article 65 of the Tort Law of the People's Republic of China use potentially vague term “polluter “without giving any further detailed definition. Such ambiguous provisions make it difficult to quickly determine the responsible party and pursue a claim after an incident of oil spill pollution.

### **vague scope of compensation**

The scope of compensation is the biggest problem in current liability regime concerning the oil pollution arising from the offshore facilities. There is no clear specialized provision existed related to the scope of the compensation .

The only specific provision is article 28 of the Implementation Measures of Regulations of the People's Republic of China Concerning Environmental Protection in Offshore Oil Exploration and Exploitation:

“(1) the removal costs incurred by the sufferers of the seawater, biological sources damages of the ocean environmental pollution caused by operators' actions;

(2) the economical losses, repair costs of damaged instruments of pro environmental pollution caused by operators' actions;



(3) Costs of investigation on the accidents caused by Offshore Oil Exploration and Exploitation.”

Professor Liying Zhang comments “though this provision set an uncomprehensive scope of compensation which is potentially useful, those guidelines are merely departmental rules that carry little legal weight, to the point that they probably will not be considered in court.”<sup>107</sup> In addition, it is clear that the compensation items listed are to a large extent limited to fee concerning the state ‘s response to oil spill . It hardly provides legal basis for third party’s damage concerning the oil pollution rising from the offshore facilities.

Marine Environment Protection Law simply stipulates “damages to marine ecosystem , marine fishery resources and marine protected area ”are recoverable .However these damages are only limited to “resulting in heavy losses to state ” , no reference of the third party ‘s damage has been made .Regarding the property damage and economic loss suffered by individual , only general tort law can be applied , however provisions in tort law are too general and vague to make the outcome of the compensation foreseeable . In practice, Victims can hardly get adequate remedies by invoking provisions in tort law .

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<sup>107</sup> Ibid

## **who is qualified claimant**

### **The state as environmental trustee**

Article 90 of the Marine Environment Protection Law stipulates: "for any damages caused to marine eco -systems, marine aquatic resources or marine protected areas that result in heavy losses to the State, the interested department empowered by the provisions of this Law to conduct marine environment supervision and control shall, on behalf of the State, claim compensation to those held responsible for the damages." In other words , the competent governing agency can claim compensation on behalf of the state regarding the damages caused to eco-systems , marine aquatic resources or marine protected areas .Article 90 of the MEPL 1999 was appreciated for being an important breakthrough in the compensation regime for marine ecological damages as it establish the state as environmental trustee to get compensation .<sup>108</sup>

However, as Article 5 of the MEPL stipulates the power to conduct marine environmental supervision and administration is spread over five departments, which department should be granted with power to file the claim on behalf of the state can be confused. For example, in the case of 1983 Eastern Ambassador oil spill case, it was Qingdao

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<sup>108</sup> Jiayi Liu .(2011) , Public Interest Claims On Marine Ecological Damages Caused by Oil Pollution Under the legal framework of Marine Environmental Protection, China Soft Science Magazine 5 .

Environmental Protection Bureau and Qingdao Bureau of aquatic products filed the claim for ecological damages.<sup>109</sup> In the similar case of 1997 Haicheng , unlike the former , it was Zhangjiang Detachment of Guangdong Fishery and Maritime Inspection Corps brought the claim .<sup>110</sup> In the latest case -Penglai19-3 oil spill incident, it is SOA to represent the state on establishing a investigation group to work on the comprehensive claims and reach the agreement with COPC concerning the ecological damage .It can be easily seen from above that department varies to be on behalf of the state to claim ecological damage in each case , therefore In practice , it may cause difficulties for the court to identify qualified claimant .

### **Units or individuals**

On the other hand, article 41 of the Environmental Protection Law stipulates that "a unit that has caused an environmental pollution hazard shall have the obligation to eliminate it and make compensation to the unit or individual that suffered direct losses." In addition, under Environmental tort in the Tort Law of the People's Republic of China the same protection is given to the individual or unit who has suffered direct losses. Suit on damages from oil pollution can be filed directly by them.

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<sup>109</sup> Shanshan Zhang .(2002) , Claimant Qualification for the Administrative Departments to Claim for Marine Environmental Damages , in Tianjin Maritime Court (2002) , Proceedings for 11<sup>th</sup> National Conference on Trails of Maritime Courts , p 52

<sup>110</sup> Yue Gaofa Final Trail No.327 Economic Verdict , Guang Dong Supreme Court (1999)

In the case of Bohai oil spill, pursuant to the agreement between COPC and MOA, COPC paid 1 billion RMB (about \$160 million) to the MOA to compensate for damage to fishery. Due to unclear and difficult application of the law, inadequacies with the evidence presented by the plaintiffs and the imbalance of power between the fish farmers and the oil firms, the case was resolved through mediation. It should be noted historically there is a tradition in China to not use litigation as a means to resolve disputes and mediation is largely encouraged by the government at the outset of a dispute rather than litigate in a court of law.<sup>111</sup> Thus, polluters often are not challenged in a court of law.

However lots of concern was raised on the justification of the mediation used in Bohai oil spill case.

Firstly, Although the oil spills claim adopted the way of reconciliation, a the basis of reconciliation should be legal fact investigation and laws. However, so far no documents have been demonstrated by both ConocoPhillips China / CNOOC and the governing agency regarding what criteria have been used to estimate the loss and damage, and

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<sup>111</sup> Jason E. Kelley, Seeking Justice for Pollution Victims in China: Why China Should Amend the Tort Liability Law to Allow Punitive Damages in Environmental Tort Cases, Seattle University Law Review, Winter 2012, Vol. 35 Issue 2, p527

what legal basis they relied on to prove that they should not be liable or that their liability could be mitigated.<sup>112</sup>

Secondly, the scope of the compensation in the agreement is only limited to fishermen, Hebei and Liaoning, does not include Shandong, Tianjin damaged fishermen.<sup>113</sup> While the settlement agreement does not identify Shandong fishermen as oil pollution damaged party, it does state: "If any evidence is discovered on damages caused by Penglai 19-3 Oil Spill Accidents to aquaculture areas in Bohai Bay other than the aforesaid areas [Liaoning and Hebei Provinces], administrative mediation and other means may still be adopted to resolve the issue." However the argument provided by ConocoPhillips China refuse to compensate Shandong fishermen is not convincing enough, ConocoPhillips stated "there is non-correspondence of the oil fingerprint collected from polluted breeding foreshores".

Thirdly, whether Ministry of Agriculture can represent the party suffered damage is under question .As there is no legal basis for a governing body to be on behalf of the individual damaged party to claim. From this point , Ministry of agriculture does not have the right to reach the agreement .

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<sup>112</sup>Deheng Law Group Convenes "Legal Seminar on the Issues Concerning ConocoPhillips China Re-production in the Bohai Area and Repudiation of Claims from Shandong Province" Available at <http://www.deheng.com/news-nr.asp?bid=52&sid=221&id=1369>

<sup>113</sup> Ibid

The fourth point, If fishermen do not satisfy the amount of compensation settled by MOA and COPC , whether the agreement signed exempts the COPC from claimed by fishermen directly is also debatable .whether it is overlapping suits is also worthy thinking .

### **Strict liabilities**

The strict liability is applied in Chinese liability regime concerning the oil pollution arising from offshore facilities .Articles 65 stipulates“Where any harm is caused by environmental pollution, the polluter shall assume the tort liability.” and article 68 stipulates “Where any harm is caused by environmental pollution for the fault of a third party, the victim may require a compensation from either the polluter or the third party. After making compensation, the polluter shall be entitled to be reimbursed by the third party.”

From the above two provisions it can be easily seen that under Tort Law a polluter should bear strict liability for the damage caused by environmental pollution . Article 65 broadens the concept of liability in environmental tort. Previously, liability for such torts was based primarily on a defendant’s violation of applicable environmental laws and regulations. Now, under the Tort Law, it seems that a defendant could be found liable for an environmental tort even though such

defendant complies with applicable environmental laws and regulations.

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### **Insurance & Compensation Fund**

Offshore regulation Article 9 stipulates “Each enterprise, institution or operator shall carry insurance or other financial guaranties in respect of civil liabilities for pollution damage”, however no specific requirements or any guidelines have been given on this issue . In practice it is normally to the discretion of license granting agency . In addition no compensation fund mechanism has been set up by statute . Therefor , there is currently no reliable financial source in China to compensate for marine oil pollution damage arising from offshore oil facilities.<sup>104</sup> The Chinese oil pollution regime would fail to provide a secure cover for the victims due to lack of effective compulsory insurance and a compensation fund which prove necessary from an economic perspective .<sup>115</sup>

### **low administrative punishment**

According to Rule 15 and rule 85 of the MEPL , fines and/or penalties can be imposed on any parties who are found liable for causing pollution to the marine environment. However there was a hot debate over the

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<sup>114</sup> Baker & McKenzie ,New Insights into Liabilities for Environmental Torts in China ,Available at <http://www.bakermckenzie.com/RRLiabilitiesEnvironmentalTortsChinaFeb10/>

<sup>115</sup> Hui Wang ,supra note 8, at 77p

highest administrative penalties according to Chinese existing law. As compared to the fine with the same nature imposed by other jurisdictions, RMB 200,000 yuan (\$32,000) is too low to represent the significantly high level of risk involved, many legal experts<sup>116</sup> concerned such kind of punishment serves to abet rather than deter the perpetrators.

To sum up, it can be easily seen that the legislations for liability concerning oil pollution rising offshore facilities are not efficient and comprehensive to cover the risk involved. There is a gap between the structure, mechanism and law in the legal system of maritime environment protection being implemented in China.<sup>117</sup> Big legal loopholes exist in the current legal framework of environment protection on the following issues: clear identification of responsible party, the compensation scope, the qualified plaintiff. In addition, no efficient financial security mechanism has been built. Therefore, there is a compelling need for China to perfect the legislations regulating the offshore oil spill by drawing on the advanced legislating experience of Europe and America.

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<sup>116</sup> See Zhang mianmian, "Bohai oil pollution" available at <http://finance.sina.com.cn/china/dfjj/20130417/083715175299.shtml>

<sup>117</sup> See more <http://www.deheng.com/news-nr.asp?bid=52&sid=221&id=1369>



## **5. Perfecting China's liability regime on oil pollution rising from offshore facilities**

In light of the severe consequence caused by Bohai oil spill , it is time for law makers of China to give concern over hazards posed by the offshore oil and gas industry and begin to review liability regime for oil pollution rising from offshore facilities .Generally, compared with countries with a developed legal framework on offshore drilling , China's legislations still have many deficiencies .By drawing on experiences from Norway , THE UK and THE USA , recommendations are made here to perfect the legislations ,which includes the below :

1)It is necessary to set clear demarcation of responsibilities amongst government bodies .Reducing the multi-layers of government agencies and ensuring the coordination between agencies are also of importance in promoting the efficiency of government .

2)One obvious deficiency in the current Chinese statutes is due to the highly general, often vague and aspirational wording that constitutes a familiar feature of Chinese law , Significant elements of many major environmental measures seem more akin to policy statements and propositions of ideals than to laws. <sup>118</sup>A significant factor contributing to

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<sup>118</sup> Stefanie Beyer , Environmental Law and Policy in the People's Republic of China , Chinese Journal of International Law (2006) 5 (1): 185-211.

this situation is the lack of definitions in Chinese environmental laws.

Therefore more specific clear definitions should be stipulated.

3) The offshore oil pollution regime can be governed either primarily through a single comprehensive statute and supplemented regulations (such as Norway regime) or through separate statutes that solve issues of different aspects (such as current China regime). Since the scope of various statutes is potentially overlapping on many issues, a overarching principle statute regulating the offshore oil operation activities may facilitate a uniformed regime and avoid regulatory duplication. In this case Norwegian Petroleum Act is an excellent example .Therefore suggestion is given to China law maker that a single statute should replace the heterogeneous patchwork with various uncoordinated statues related to offshore oil pollution liability in order to provide a 'single door ' which simplifies the application of law .

4) In OPA, OPOL and Norwegian Petroleum Act , detailed and specific provisions on the responsible parties for oil pollution damages and the scope of compensation have been formulated , the relevant responsible parties can be identified easily and quickly which lays a sound foundation for subsequent compensation claims and penalty administration. Therefore, suggestion is given to stipulate clear provision

on identifying the responsible party in the single statute .Also, the scope of compensation and claimant need to be clarified.

5) It is necessary to strengthen the financial responsibility requirements for offshore facilities. An oil pollution fund should also be built to facilitate the compensation.

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